No. 02-324

NOV 26 2002

In The

Supreme Court of the United States

ROBERT M. COY, JR.,

Petitioner,

v.

GLENN W. PHELPS, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR NOT GRANTING THIS WRIT OF CERTIORARI 4

I. The Facts of this Case 4

II. The Sixth Circuit Correctly Decided this Case 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Austin v. Hamilton, 945 F.2d 1155 (10th Cir. 1991).....10

Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996) 6

Feemster v. Dehntjer, 661 F.2d 87 (8th Cir. 1981).....12

Fontana v. D.E. Haskin, 262 F.3d 871 (9th Cir. 2001)..... 5

Frohmader v. Wayne, 958 F.2d 1024 (10th Cir. 1992).....10

Graham v. Connor, 490 U.S. 386 (1989).....8, 12

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 9

Lewis v. Downs, 774 F.2d 711 (6th Cir. 1985).....12

McDowell v. Rogers, 863 F.2d 1302 (6th Cir. 1998).....10, 12

Pierson v. Ray, 386 U.S. 547 (1967)..... 9

Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988) 9

Pray v. Sandusky, 49 F.3d 1154 (6th Cir. 1995)..... 9

Rich v. City of Mayfield Heights, 955 F.2d 1092 (6th Cir. 1992)..... 9

Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997).....5, 6, 7

Saucier v. Katz, 533 U.S. 194 (2001) 9

Tennessee v. Garner, 471 U.S. 1 (1985).....10

United States v. Cobb, 905 F.2d 784 (4th Cir. 1990)..... 5

Walston v. City of Southfield, 995 F.2d 1331 (6th Cir. 1988)..... 9

Wegener v. Covington, 933 F.2d 390 (6th Cir. 1991) 9

Wilkins v. May, 872 F.3d 190 (7th Cir. 1989)..... 6

Williams v. Pollard, 44 F.3d 433 (6th Cir. 1995) 9

STATEMENT OF THE CASE

The case concerns the actions of a police officer, Defendant Robert Coy, that caused physical and mental injuries to Glenn Phelps, a pre-trial detainee, on August 30, 1997 in Xenia, Ohio. The events of August 30, 1997 violated Glenn Phelps' constitutional rights under the Fourth and Fourteenth Amendments of the United States Constitution. Plaintiff set forth claims in his complaint against Defendant Coy and others under 42 U.S.C. § 1983 and state common law alleging, inter alia, that his rights under the Fourth and Fourteenth Amendments were violated by the use of excessive force. Petitioner takes issue with the holding of the Sixth Circuit Court of Appeals that Coy was not entitled to summary judgement on Plaintiff's § 1983 claims against him based upon the doctrine of qualified immunity. In accordance with the request of this Court, Respondent now comes requesting that this Court deny certiorari and permit the decision of the Sixth Circuit Court of Appeals to stand on this matter.

Glenn Phelps was picking up trash in his neighborhood and was returning a beer bottle to Chubby's Bar when he was arrested by two police officers, Defendant Robert Coy and Officer Christian Stutes. It is important to note that Mr. Phelps was at the time a 39-year-old with a diminished mental capacity of that of a nine-year-old child. As a result of this, Glenn Phelps is under the supervision of his sister Elizabeth Phelps and completely dependent on the State of Ohio for financial support since he cannot successfully maintain a job. Officers Coy and Stutes told Mr. Phelps that he was being arrested for an open container violation, a minor misdemeanor, Xenia City Ordinance § 612.07(e). They did not inform him of any other reason for his arrest. Glenn Phelps was handcuffed

with his arms behind his back and taken to the police station.

While at the police station, Mr. Phelps was seated on a bench, still restrained with his arms handcuffed behind his back. There were several other officers at the police station at this time. While in the process of being booked and upon the demand of Officer Stutes, Glenn Phelps lifted his foot up so his shoes and socks could be searched for hidden objects. Upon further demand by Officer Stutes that the level to which Mr. Phelps raised his foot was not high enough, he raised his foot higher. Since Glenn Phelps still had his arms handcuffed behind his back, it was awkward for him to remove his shoes and raise his feet. As a result, Mr. Phelps lost his balance in his seated position causing his foot to come up higher than he intended, coming close to Officer Stutes' face. Officer Stutes was holding Mr. Phelps' foot in his hand when suddenly Defendant Coy tackled Mr. Phelps to the ground.

Upon being tackled to the ground with his arms pinned behind his back, Glenn Phelps was then further abused by Defendant Coy as Officer Stutes did nothing to stop the beating of Mr. Phelps by Defendant Coy. Defendant Coy sat on top of Glenn and placed his weight onto Glenn's arms which were pinned behind his back. Defendant Coy then repeatedly forced Mr. Phelps' head to come in contact with the floor of the police station. While Defendant Coy was slamming Glenn Phelps' head on the floor, Defendant Coy repeatedly shouted "Don't you ever kick at one of my officers!" and "You are not going to kick one of my officers! I am not going to stand for it!" Officer Stutes and Officer Sams observed the entire series of events. Neither man made any attempt to intervene or inform

Defendant Coy that Glenn had not in fact made any contact with Officer Stutes.

Glenn Phelps received a split lip, bruises, and severe mental distress from the incident. His physical injuries were treated at a local hospital. Mr. Phelps has been diagnosed with major depression, posttraumatic stress disorder and generalized anxiety disorder as a result of the beating and punishment he sustained at the hands of the Defendants. As a result of the events of August 30, 1997, an internal investigation resulted in a request for Disciplinary Action against Defendant Coy for the use of excessive force. In this report it was found that the actions of Defendant Coy were solely for the purpose of punishing Glenn. The report also found that the amount of force used by Defendant Coy was excessive. As a result of the investigation and recommendation, Defendant Coy was terminated. All criminal changes against Mr. Phelps were subsequently dismissed.

On September 15, 2000, Judge Walter Rice of the Federal District Court for the Southern District of Ohio, Western Division in Dayton, Ohio denied the Motion for Summary Judgement of Coy, which was based upon the doctrine of qualified immunity. Officer Coy appealed the decision of Judge Rice denying his motion for summary judgement based upon qualified immunity, and said decision was upheld by the Sixth Circuit Court of Appeals in an Opinion of April 12, 2002, holding that the Fourth Amendment reasonableness standard applies to the actions of Defendants in this case and that no reasonable officer could have thought that the alleged actions were lawful. Defendant Coy, Petitioner, now seeks to have this

Court review the decision of the Sixth Circuit Court of Appeals on this matter.

REASONS FOR NOT GRANTING THIS WRIT OF CERTIORARI

I. The Facts of this Case

The facts of this case do not provide a framework suitable to the task before the court of deciding the monumental issue of when the Fourth Amendment protection terminates and when the protection of the Fourteenth Amendment commences. As noted by Petitioner, the circuits are split on this issue as it pertains to individuals after that stage of initial seizure, but prior to their being booked and imprisoned awaiting trial. The majority of circuits that have addressed this issue, including the Second, Third, Sixth, Eighth, Ninth and Tenth Circuits have adopted the "continuing seizure" approach which provides Fourth Amendment protection to individuals as long as the arresting officer is accompanying the arrested individual, including that point where the individual is in custody at the police station. Three Circuits, the Fourth, Seventh and Eleventh, have applied the Fourteenth Amendment in cases in which an individual has been initially seized and is still in the custody of the arresting officer. An issue of such great import should be decided upon a fact pattern which would permit this Court to draw clear lines of demarcation to guide the judiciary in its rulings on such cases. The facts of this case are not the type of facts upon which this critical issue should be decided.

This case is one in which a mentally deficient individual was stopped and arrested for a ticketable offense.

There were no charges that were established arising out of this arrest. There existed no evidence that Mr. Phelps ever resisted arrest in any manner. It raises the question of why Mr. Phelps was ever seized to begin with and what these officers planned to do with him at the police station. Did they intend to incarcerate him for a ticketable offense? It would seem that Fourth Amendment protections should never terminate in a case in which an individual is not booked for his alleged offense.

In fact, some of the circuits that have addressed the issue raised by Petitioner provide cases with fact patterns that more clearly set forth the issues presented here. In *Riley v. Dorton*, 115 F.3d 1159, 1160-1 (1997), the claimant had been arrested on charges of rape, sodomy, and abduction for immoral purposes, pursuant to outstanding warrants. The court in *Riley* stated that "as Riley concedes, Dorton arrested him pursuant to a valid warrant. '[A]s one lawfully arrested and being held prior to a formal adjudication of guilt,' Riley is adjudged in our circuit to be a pretrial detainee." *Citing United States v. Cobb*, 905 F.2d 784, 788 (4th Cir. 1990). In *Wilkins v. May*, 872 F.3d 190 (1989), the claimant had been arrested on suspicion of bank robbery. The plaintiff in *Fontana v. D.E. Haskin*, 262 F.3d 871 (9th Cir. 2001) had been arrested on suspicion of driving under the influence of alcohol. These are the types of offenses that give rise to a need to determine at what point the Fourth Amendment protections cease, because it is in these types of cases that the possibility of legal and proper pre-trial incarceration begins. It should be noted that none of the offenses in the above-mentioned cases are merely ticketable offenses.

It must be conceded that Glenn Phelps was erroneously arrested for a ticketable offense for which incarceration

would be improper. That said, this Court should wait for a case that provides a fact pattern where pre-trial detention would be necessary. None of the cases cited by Petitioner have fact patterns in which the individual making the claim had been beaten by his arresting officer following an arrest for a ticketable offense. It is, therefore, abundantly clear that this Court should refrain from resolving the split between the circuits until such time as a fact pattern arises that will permit a decision that will be of guidance to bench and to bar regarding when the amendments apply to excessive force cases.

For example, a case that would provide an adequate factual basis for the determination of this issue would be the case of *Riley v. Dorton*, *supra*, which was cited by Petitioner. *Riley* involved an individual who had been arrested on charges of rape, sodomy, and abduction for immoral purposes, pursuant to outstanding warrants, who was arrested for the sole purpose of being incarcerated and tried for a serious felony. Other such cases include *Wilkins v. May*, 872 F.3d 190 (1989), where the claimant had been arrested on suspicion of bank robbery, and *Cottrell v. Caldwell*, 85 F.3d 1480, where the decedent on whose behalf the claim was brought engaged in a twenty-minute physical struggle and altercation with police officers who had been called to his residence. All of these cases involved facts in which the person arrested was most assuredly arrested to be detained until formally charged and tried for their crimes, much unlike an alleged open container violation.

Glenn Phelps, on the other hand, was arrested for a ticketable misdemeanor offense for which he was never convicted. He was in the custody of his arresting officers at the police station and there is no reason to believe that, as

in *Riley*, he was being held prior to a formal adjudication of guilt. In fact, this ticketable violation would never be grounds for holding an individual in custody prior to an adjudication of guilt. Consequently, the facts of the instant case do not provide a substantive foundation for this Court to render a decision on this subject of immense importance. On the issue of the application of the Fourth and the Fourteenth Amendments, until presented with a case that provides a fact pattern for a clear application of one or the other amendment, this Court should refrain from deciding this split among the circuits. Such a case would involve an individual who commits a serious crime and alleges excessive force during that time between arrest and conviction that has created the legal problems with which this Court is now faced. That type of case would provide the factual background for this Court to delineate clearly which amendment applies. It is the argument of Respondent that when the crime for which one is charged is a ticketable offense, there can never be that so-called "gray area" as there would be no justification for holding Glenn Phelps in custody pending a trial on this ticketable matter.

Moreover, of additional importance concerning the facts of the instant case is the fact that Glenn Phelps had the mental capacity of a nine-year-old. Such a fact complicates the issues involved here and does not provide the Court with a clear-cut fact pattern for the resolution of divergent opinions of the Circuit Courts concerning application of the Fourth and Fourteenth Amendments. Petitioner has filed for certiorari for two purposes. It is likely that his first objective is to obtain a reversal of the Sixth Circuit's decision so as to reduce the likelihood that he will be held accountable for his acts using unnecessary force on

Mr. Phelps. Second, Petitioner seeks to have this Court give guidance to the federal judiciary concerning the application of the law. Using a case which involves such a peculiar fact as the arrestee having the mental capacity of a child only makes the use of this fact pattern less suitable for clarifying the applications of the Fourth and Fourteenth Amendments to an excessive force case. This Court should wait until a more simple and universally pertinent fact pattern arises to use to resolve this issue.

II. The Sixth Circuit Correctly Decided this Case

Denial of the Summary Judgement Motion of Defendant Coy by the District Court was appropriate and was appropriately affirmed by the Sixth Circuit Court of Appeals. Coy is not entitled to qualified immunity because (1) summary judgment is not warranted where there is a factual dispute, as there is in this case, involving an issue on which the question of immunity turns; (2) Glenn Phelps' right under the Fourth Amendment to be free of the use of excessive force after an arrest when he was under the custody and control of the Defendants on the night of August 30, 1997, is clearly established, *see Graham v. Conner*, 490 U.S. 386 (1989), and (3) that any reasonable official would have understood that tackling and abusing a restrained pre-trial detainee violates a clearly established right under the Fourth Amendment to be free from the use of excessive force after an arrest and when the detainee is under the custody and control of the official.

The Sixth Circuit Court of Appeals correctly decided this case in applying the Fourth Amendment reasonableness test to the facts of this case and denying summary judgment. Provided their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known, police officers are afforded qualified immunity for their discretionary functions. *See Pierson v. Ray*, 386 U.S. 547, 557 (1967), *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In the Sixth Circuit, immunity questions are resolved at the earliest possible stage of litigation. *See Poe v. Haydon*, 853 F.2d 418, 426 (6th Cir. 1988). Where the actions of the officers are subject to more than one interpretation, the jury must find the facts, and then the court will make the qualified immunity determination based on those facts. *Id.*; *see also Williams v. Pollard*, 44 F.3d 433, 435 (6th Cir. 1995); *and Walston v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1988).

In the Sixth Circuit, summary judgment is not appropriate if there is a factual dispute involving an issue on which the question of immunity turns or if the undisputed facts show that the defendant's conduct clearly violates established rights. *See Rich v. City of Mayfield Heights*, 955 F.2d 1092 (6th Cir. 1992). If a defendant claims qualified immunity, the defendant must first come forward with facts to suggest that they were acting within the scope of their discretionary authority during the incident in question. *See Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991). Once a defendant overcomes this burden, the plaintiff must: (1) identify a clearly established right alleged to have been violated; and (2) establish that a reasonable officer in the defendant's position should have known that the conduct at issue was undertaken in violation of that right. *See Saucier v. Katz*, 533 U.S. 194 (2001); *see also Pray v. Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995).

The Sixth Circuit Court of Appeals and the District Court for the Southern District of Ohio were correct in denying summary judgement based upon an analysis of excessive force under the Fourth Amendment rather than the Eighth or Fourteenth Amendments. Individuals' civil rights claims have been analyzed under the Fourth Amendment, appreciating the difference between the use of force against a free citizen before an arrest and person who has been seized and is classified as pre-trial detainee.

When a police officer restrains the freedom of a person to walk away, the officer has seized that person. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985). In this case Glenn was clearly seized under the law. He was handcuffed behind his back, placed into a police cruiser, and taken to the police station. The question, then, was what protections were afforded him under the United States Contitution.

Based upon the holding of the Sixth Circuit in *McDowell v. Rogers*, 863 F.2d 1302 (6th Cir. 1998), the seizure which occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers. Therefore, in accordance with *McDowell*, the Court of Appeals applied the standards of the Fourth Amendment when assessing the Plaintiff's § 1983 claim of excessive force. Similarly, the 10th Circuit in *Frohmader v. Wayne*, 958 F.2d 1024, 1026 (10th Cir. 1992) held that "claims of post-arrest excessive force by arrestees * * * who are detained without a warrant, are governed by the 'objective reasonableness' standard of the Fourth Amendment * * * ." *Citing Austin v. Hamilton*, 945 F.2d 1155, 1160 (10th Cir. 1991). It was undoubtedly correct for the 6th Circuit to apply the Fourth Amendment standard to the present case as Glenn Phelps was arrested

for a ticketable offense and was being held in custody without a warrant by his arresting officer. As there was no trial ensuing from this arrest, he cannot be classified as a pre-trial detainee such as to bring an end to the Fourth Amendment's protections.

Glenn Phelps was arrested for an open container violation. The severity of this crime is extremely low. In fact, it is a minor misdemeanor under Xenia City Ordinance § 612.07(e), which should not result in an arrest and physical restraint according to the affidavit of Officer McCauley obtained in this case. After the improper physical seizure by the officers involved, they had attempted to buttress their actions by also charging Mr. Phelps with resisting arrest on August 30, 1999. All charges against Glenn were subsequently dismissed.

Defendants' claim for qualified immunity is predicated upon Defendant Coy's erroneous conclusion that Glenn kicked at Officer Stutes. Glenn was restrained with his arms behind his back. Glenn was at a police station with several other officers in the vicinity. Glenn was struggling to comply with directions to lift his feet while in a restrained position, and lost his balance. Officer Stutes himself has said that he caught Glenn's foot in his hand. Any aggressive action allegedly perceived by Defendant Coy surely did not warrant tackling Glenn to the floor, sitting on top of Glenn while Glenn's arms were still handcuffed behind his back, grabbing Glenn, pounding his head on the concrete floor and yelling "You are not going to kick at one of my officers! I am not going to stand for it!" This was not a situation where anyone can claim that there was an immediate threat to the safety of the officers or others. Glenn was not trying to evade or resist arrest,

he was simply trying to comply with directions given by Officer Stutes.

The Sixth Circuit has held that beating and kicking a restrained suspect who is in control of the police is "plainly excessive" force. *See Lewis v. Downs*, 774 F.2d 711, 714 (6th Cir. 1985); *see also McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988); *Feemster v. Dehntjer*, 661 F.2d 87, 89 (8th Cir. 1981). Herein, the facts of the instant cause give rise to the application of the aforementioned cases. Defendant Coy clearly used excessive force against Glenn who was restrained and under the control of the police at the time he was tackled by Defendant Coy, pinned to the ground and then repeatedly had his head beaten onto the concrete floor of the police station

The District Court correctly applied the Fourth Amendment Standard and held that there was a genuine issue of material fact as to whether Defendant Coy utilized excessive force in the present case. Defendant Coy is not entitled to qualified immunity under *Graham v. Connor*, 490 U.S. 386 (1989), because Glenn Phelps' clearly established right under the reasonableness test of the Fourth Amendment is to be free of the use of excessive force after an arrest when he was under the custody and control of the Defendants on the night of August 30, 1997 was knowingly violated. Any reasonable official would have understood that tackling and abusing a restrained pretrial detainee violates a clearly established right under the Fourth Amendment to be free from the use of excessive force after an arrest and when the detainee is under the custody and control of the official.

CONCLUSION

This Court has been asked to grant certiorari in the present case to resolve the issue of whether the Fourth or Fourteenth Amendment provides protection to individuals such as Glenn Phelps who allege excessive force by their arresting officers after the actual arrest has been effectuated. Respondent asserts that this Court should not grant certiorari because the facts of the case will not serve to provide a clear demarcation for guidance of bench and bar, the facts of the case are distinguishable from the type of offenses in which this issue arises as the offense for which Glenn Phelps was arrested was merely a ticketable offense, and the Sixth Circuit was correct, based upon the facts of the case, to apply the Fourth Amendment in making its determination.

Respectfully submitted,

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